No. 87-650

In the Supreme Court of the United States

OCTOBER TERM, 1987

WALTER L. NIXON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the question to which petitioner gave a false negative answer was sufficiently unambiguous to support a perjury conviction.

2. Whether the evidence was sufficient to support a perjury conviction.

3. Whether a suggestion for rehearing en banc is properly rejected when three judges vote against it, no judge votes for it, and eleven judges are recused.

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction (Pet. App. 9a-28a) is reported at 816 F.2d 1022. The opinion of the court of appeals denying the petition for rehearing (Pet. App. 1a-8a) is reported at 827 F.2d 1019. The opinion of the district court (Pet. App. 29a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1987. A petition for rehearing was denied on September 8, 1987. The petition for a writ of certiorari was filed on October 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner, a federal district judge, was convicted on two counts of

making false material statements before a grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to concurrent five-year terms of imprisonment on each count. The court of appeals affirmed.

1. a. In August 1980, Drew Fairchild, the son of a successful investor named Wiley Fairchild, conspired with several others to pick up a load of marijuana in Colombia and fly it to the United States. Drew Fairchild's role in the scheme was to provide access to an airport for refueling the plane. The scheme was brought to a halt when the plane was intercepted by law enforcement officials at the airport. Pet. App. 10a.

A federal grand jury indicted three of the conspirators, but not Drew Fairchild, on August 19, 1980. Following that indictment, Drew Fairchild and his attorney, William Porter, went to Forrest County District Attorney Paul ("Bud") Holmes to discuss the situation. Holmes, in turn, sent them to United States Attorney George Phillips, who was prosecuting the indicted conspirators. After meeting with Phillips, Drew Fairchild agreed in writing on November 19, 1980, to plead guilty to federal felony charges and to cooperate with the government in exchange for a recommendation of a five-year suspended sentence and a $15,000 fine. Pet. App. 10a-11a. No charges were filed against Drew Fairchild at that time, however, and he did not enter the plea that he had negotiated.

In the following months, the federal prosecutors concluded that Drew Fairchild was not being completely cooperative. A federal prosecution against Drew Fairchild was considered. Tr. 148-149, 219-220, 238. Before any federal proceedings took place, however, District Attorney Holmes offered to take over the prosecution and seek indictments in state court (Tr. 220-221, 732-733). On August 26, 1981, Holmes obtained an indictment from a

[1] Petitioner was acquitted of a third count alleging that he had made a false statement to the grand jury, as well as a count alleging that, in violation of 18 U.S.C. (1982 ed.) 201(g) (now codified at 18 U.S.C. (Supp. IV) 201(c)(1)(B)), he had received an illegal gratuity.

state grand jury against Drew Fairchild and a co-defendant on charges stemming from the August 1980 drug-smuggling incident. Pet. App. 11a.[2]

Drew Fairchild agreed to testify against his co-defendant on the state charges in exchange for assurances from Holmes that he would receive probation and a $5000 fine on the state charges. On January 12, 1982, he entered a plea of guilty in state court. Sentencing was postponed several times, however. On December 23, 1982, Holmes moved successfully to have Drew Fairchild's case "passed to the file," a procedure that places a pending case in an inactive status and typically results in its termination. Because of media publicity, however, the case was recalled to the active file just a few weeks later. Nevertheless, the case was continued, without sentencing, throughout 1983 and 1984. Pet. App. 11a-12a.

b. Petitioner, seeking a source of income to augment his salary as a federal judge, had made lucrative investments in oil and gas properties through the intercession of Wiley Fairchild, Drew Fairchild's father (Pet. App. 10a).[3] Petitioner was also a good friend of Holmes (*id.* at 14a, 57a).

Sometime after Drew Fairchild's January 1982 plea of guilty in state court, Wiley Fairchild turned to petitioner for help in dealing with Holmes (Pet. App. 14a). During a meeting in Wiley Fairchild's office, Wiley Fairchild told

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[2] Holmes thought (correctly as it turned out) that indicting Drew Fairchild would help Holmes's friend Porter to collect the legal fee that he sought for his services to Drew Fairchild (Pet. App. 11a).

[3] Both petitioner and Wiley Fairchild were indicted on federal charges on the theory that these investments, some of which were made after Drew Fairchild's troubles began, amounted to an unlawful gratuity paid by Wiley Fairchild to petitioner. As petitioner notes (Pet. 6 n.2), Wiley Fairchild pleaded guilty to paying an illegal gratuity to petitioner, but petitioner was acquitted at trial on the gratuity charge.

petitioner about Drew Fairchild's agreement with Holmes, and he expressed the opinion that Holmes was picking on Drew Fairchild because of Wiley Fairchild's wealth (Tr. 480-484). Petitioner testified at trial that during this meeting he " 'got the impression that [Fairchild] wanted me to mention something about [the case] to Bud Holmes' " (Pet. App. 15a).

Petitioner then visited Holmes in his office, and the two drove to Holmes's farm. According to Holmes's later testimony, petitioner stated during the trip that he had visited Wiley Fairchild and that Fairchild had asked him " 'to put in a good word for his boy, or would I say something to you about Drew' " (Pet. App. 15a). Holmes responded by inquiring what Wiley Fairchild wanted (*ibid.;* Tr. 736, 737). When petitioner reiterated that he was simply " 'put[ting] in a good word' " and not asking Holmes to do anything, Holmes volunteered, " 'I'm district attorney, I'll pass it to the files' " (Pet. App. 16a). Petitioner replied, " 'I'm not asking you to do anything now' " (*ibid.*).

Holmes testified that he informed petitioner of the plea agreement that he had reached with Drew Fairchild's attorney (Pet. App. 17a). According to both Holmes (*ibid.*) and Wiley Fairchild (*id.* at 21a), petitioner then telephoned Wiley Fairchild from Holmes's farm and said either that Drew Fairchild " 'isn't going to jail' " (*id.* at 17a) or that " 'everything [is] going to be taken care of to your satisfaction' " (*id.* at 21a). According to Holmes, petitioner also expressed appreciation for Wiley Fairchild's assistance in making investments (*id.* at 17a). Holmes then got on the phone. According to Wiley Fairchild, Holmes said, " 'when this man asks me to do something, I don't ask no questions, I just go ahead and do it' " (*id.* at 22a). According to Holmes's testimony, petitioner's conversation with him subsequently "caused enough influence on [him] to go ahead and do what I did,"

that is, pass the case to the file (Tr. 938, 942; see also Tr. 754).

c. On November 3, 1983, an attorney who had worked for Wiley Fairchild telephoned the FBI and alleged that Wiley Fairchild had conveyed mineral rights to petitioner in exchange for his intercession in the drug case involving Wiley Fairchild's son (Tr. 273, 300, 315-319, 347). In connection with an investigation of the allegation, a federal prosecutor interviewed petitioner on April 19, 1984. After the prosecutor outlined to petitioner the chronology of events relating to the case, petitioner denied having any knowledge of the case; denied that Holmes had ever talked to him about the case; and denied having been asked by Wiley Fairchild to intercede on behalf of his son (Pet. App. 50a, 53a-54a). Shortly thereafter, petitioner spoke with Holmes, denied having talked with anyone about the Drew Fairchild case, and inquired whether his phone call to Wiley Fairchild from Holmes's farm had been recorded (Tr. 758-759).

A federal grand jury began an investigation of the matter. On July 18, 1984, petitioner testified before the grand jury. The prosecutor explained that the case involving Drew Fairchild had been "indicted by the state." Petitioner agreed with the prosecutor that there had been "some criticism of the way the state handled the case." The prosecutor also stated that Holmes was the state prosecutor who handled the case, and petitioner described Holmes as his "long time friend." Immediately after this background discussion, the prosecutor inquired whether Holmes, the state prosecutor, had "ever discuss[ed] the Drew Fairchild case with" petitioner. Petitioner responded that, to the best of his recollection, he had not. He then immediately explained that "the federal government has nothing to do with a state court prosecution. * * * The federal courts are prohibited, even if we were asked by properly filed proceedings, from interfering in any way or having any input

or say so with reference to any state court—ongoing state court criminal action." Pet. App. 56a-57a.[4]

The prosecutor then asked petitioner further questions about "the criticism that you read about or heard about directed at Bud Holmes' handling of the Drew Fairchild case" (Pet. App. 58a). Petitioner acknowledged having read such criticism in a newspaper, and he was then asked, "Did Wiley Fairchild ever discuss the case with you?" (*ibid.*). Petitioner denied that any such discussion had taken place, and, when he was asked whether "Wiley Fairchild ever ask[ed] you to do anything vis-a-vis his son's case," petitioner replied, "Absolutely not" (*ibid.*).

At the conclusion of his grand jury testimony, petitioner was asked if there was anything he wanted to add. Petitioner then made the following statement (Pet. App. 60a-61a):

> I've been told and led to believe and read in the newspaper and heard on the news media so much about this is an investigation of the Drew Fairchild criminal case. Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court. I don't need to reconstruct anything with reference to that. I've told you that from the beginning.
>
> I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where—someone told me maybe Judge Russell handled one of the other defendants also and—but I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or

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[4] To reinforce this point, petitioner made reference (Pet. App. 57a-58a) to the docrine of *Younger* v. *Harris*, 401 U.S. 37 (1971).

judge, in any way influence [*sic*] anybody with respect to this case.

d. In March 1985, many months after petitioner gave this testimony, something finally happened in Drew Fairchild's long-pending case in state court. The judge to whom the case had been reassigned announced that he would not honor Drew Fairchild's plea agreement with District Attorney Holmes. Pet. App. 12a. On March 29, 1985, Drew Fairchild was for the first time indicted on federal charges stemming from the August 1980 conspiracy to smuggle marijuana (*id.* at 10a). He entered a guilty plea in federal court and was sentenced to six months in prison (*id.* at 12a).

2. On August 29, 1985, the grand jury indicted petitioner on one count of accepting a gratuity (Count I) and on three counts alleging that he had made false statements during his appearance before it (Counts II-IV). Count II alleged that he had testified falsely that Wiley Fairchild had never discussed the case with him and that Wiley Fairchild had never asked him to do anything vis-a-vis Drew Fairchild's case. Count III alleged that petitioner had testified falsely in denying that District Attorney Holmes had ever discussed "the Drew Fairchild case" with him. Count IV alleged that petitioner had testified falsely that he had "had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court" and that he had "never talked to anyone, state or federal, prosecutor or judge, in any way [to] influence anybody with respect to this case." Count IV alleged that that testimony was false because petitioner, in fact, "did have something to do with the Drew Fairchild drug case as he had sought to influence the case by asking state prosecutor Paul H. 'Bud' Holmes to do what he could for Drew Fairchild and thereby handle the case in a way that would please Wiley Fairchild." Pet. App. 64a-71a (emphasis omitted).

At trial, the jury returned verdicts of guilty on Counts III and IV. It acquitted petitioner on Counts I and II. The district court denied petitioner's post-trial motion for a judgment of acquittal (Pet. App. 29a-41a). Among other things, the court rejected petitioner's contention that the evidence was insufficient to support the convictions on Counts III and IV, observing that "there was ample evidence from which a jury could find guilt beyond a reasonable doubt on Counts III and IV" (*id.* at 31a).

2. A panel of the court of appeals, consisting of two Fifth Circuit judges and a judge of the Second Circuit sitting by designation, unanimously affirmed, also rejecting petitioner's claims regarding the sufficiency of the evidence. In particular, the court of appeals rejected petitioner's argument that the question whether he had ever discussed the Drew Fairchild case with Holmes was ambiguous. Pet. App. 9a-26a.[5]

Petitioner then filed a petition for rehearing with a suggestion for rehearing en banc. Of the 14 active judges on the court of appeals, 11 were recused (Pet. App. 2a & n.1). Because, under Fifth Circuit Rule 35.6 (see *id.* at 45a), rehearing en banc is granted only on a favorable vote of a majority of all active judges, and not just a majority of all nonrecused judges, it was impossible that petitioner's suggestion of rehearing en banc would succeed under Rule 35.6. While the suggestion was pending, petitioner and the government both filed memoranda addressing the procedure for handling the suggestion of rehearing en banc.

Petitioner suggested that rehearing en banc should be granted if a majority of the nonrecused judges in regular active service voted in favor of rehearing en banc. Alternatively, he maintained that the number of judges voting

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[5] The court of appeals also rejected petitioner's claims of prosecutorial misconduct, improper denial of a bill of particulars, improper failure to sever or dismiss the gratuity count, and evidentiary error (Pet. App. 26a-28a).

on whether to rehear the case en banc should be enlarged by a waiver or withdrawal of recusals, the designation of senior judges to vote, or the assignment of judges from other circuits. Pet. App. 2a-4a & n.2.

All three members of the panel voted to deny rehearing. In addition, none of the three nonrecused active judges of the court of appeals called for a vote on the suggestion of rehearing en banc, and all three indicated that they would vote against rehearing en banc if a poll were taken (Pet. App. 1a-2a, 3a n.3, 4a-5a).[6] All 11 recused judges maintained their recusals (*id.* at 3a n.2, 4a n.4). The court rejected petitioner's suggestion that senior judges or judges from other circuits vote on the rehearing suggestion, on the ground that there is no statutory authority for such a procedure (*id.* at 5a-6a). The court also rejected petitioner's suggestion that the Constitution required such a procedure regardless of the lack of statutory authority (*id.* at 6a-7a). Finally, the court observed that, although petitioner had characterized his contentions otherwise, any error in the panel opinion "would at most amount to one of misapplication of precedent to the facts at hand" and thus would not present the kind of issue worthy of en banc consideration (*id.* at 8a).

ARGUMENT

1. Relying on *Bronston* v. *United States*, 409 U.S. 352 (1973), petitioner contends (Pet. 14-18) that the question whether District Attorney Holmes had ever discussed "the Drew Fairchild case" with him was so ambiguous that his conviction on the count alleging the falsity of his denial that such a discussion occurred should be reversed. That

[6] The court also indicated that it would abide by Rule 35.6 even if a majority of the nonrecused judges had voted in favor of rehearing en banc (Pet. App. 4a).

fact-bound claim was properly rejected by the court below and does not warrant further review.[7]

In *Bronston,* 409 U.S. at 359, the Court held that the perjury statute did not embrace a literally true but unresponsive answer, even though the answer was arguably misleading by negative implication. The Court reasoned that a perjury conviction must rest on the utterance by the accused of a false statement and not on the particular interpretation that the questioner or factfinder places on an answer (*id.* at 360).

This case is a far cry from *Bronston.* The statement alleged to be perjurious in *Bronston* was "[t]he company had an account there [in Switzerland] for about six months, in Zurich"—a statement that was absolutely true but happened to be unresponsive to the question asked, which was whether Bronston himself had ever had a Swiss bank account (409 U.S. at 354). Petitioner, by contrast, did not make a true but unresponsive statement; he simply denied that Holmes had "ever discuss[ed] the Drew Fairchild case" with him (Pet. App. 57a). And Holmes *had* discussed the Drew Fairchild case with petitioner.

Petitioner's real argument is not that his denial of having ever discussed the Drew Fairchild case with Holmes was literally true, as in *Bronston,* but that he could have taken the question as an inquiry only into his discussions with Holmes (a state prosecutor) of the *federal* authorities' handling of matters relating to Drew Fairchild. In making that argument, petitioner seeks to draw on cases from the

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[7] Petitioner also suggests that the court below has held "that juries may decide perjury charges even when the question was ambiguous" (Pet. 16) and that there is sharp division among the lower courts on that question. Petitioner's premise is false, however. Far from holding that there was an ambiguous question in this case but that the issue should go to the jury, the court of appeals held that there was no ambiguous question in this case. The court of appeals specifically stated, "There is certainly no ambiguity in the question, 'Did [Holmes] ever discuss the Drew Fairchild case with you?' " (Pet. App. 24a).

lower courts in which perjury convictions have been reversed because, although the answers given to particular questions have been responsive, the questions themselves have been reasonably susceptible to constructions under which the answers given were true.

Those cases hold that, when a line of questioning is so vague as to be fundamentally ambiguous, the answers associated with the questions posed may be insufficient as a matter of law to support a perjury conviction. See, *e.g.*, *United States* v. *Lighte*, 782 F.2d 367 (2d Cir. 1986). As the court explained in *Lighte*, 782 F.2d at 375 (citations omitted):

> A question is fundamentally ambiguous when it "is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." * * * When ambiguity in questioning is raised, the "defense . . . may not be established by isolating a statement from context, giving it in this manner a meaning entirely different from that which it has when the testimony is considered as a whole."

In assessing whether a question is fundamentally ambiguous, an appellate court has the limited role of determining whether, when considered in context, the question asked was " 'subject to a reasonable and definite interpretation by the jury.' " *United States* v. *Chapin*, 515 F.2d 1274, 1280 (D.C. Cir.) (quoting *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965)), cert. denied, 423 U.S. 1015 (1975); see *United States* v. *Lighte*, 782 F.2d at 372.

Petitioner maintains that the question whether he discussed "the Drew Fairchild case" with District Attorney Holmes was ambiguous because, from the context of the question, he could reasonably have construed it to relate

only to the *federal* authorities' actions concerning Drew Fairchild (Pet. 16). Such a construction, however, " 'isolat[es] [the] statement from [its] context, giving it * * * a meaning entirely different from that which it ha[d] when the testimony is considered as a whole' " (*Lighte,* 782 F.2d at 375). It also ignores the parts of petitioner's testimony that demonstrate that, whether or not he *could* have understood the question to refer to a federal "Drew Fairchild case," he did not in fact so understand the question.

The prosecutor introduced the topic of petitioner's discussion with Holmes by reminding him that he had testified that "there was some criticism of the way the *state* handled the case." The prosecutor then added that "[t]he grand jury has heard evidence that the prosecutor, *the state prosecutor*, who eventually handled the case was an individual named Bud Holmes." He then inquired whether Holmes "ever discuss[ed] the Drew Fairchild case with you." Pet. App. 56a-57a (emphasis added). In this context, it was readily apparent that the prosecutor's question was directed toward the state prosecution; indeed the question would have made no sense if it had referred to the federal authorities' handling of the matter. This is especially so because at the time of petitioner's grand jury testimony there never had been a "Drew Fairchild case" in federal court. There had only been a prosecution in which Drew Fairchild was an unindicted co-conspirator, and a pre-indictment plea agreement between Drew Fairchild and the federal prosecutor.[8]

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[8] Petitioner also errs in suggesting that the term "discuss" as used in the question was ambiguous because it can imply an extensive exploration of a subject rather than a passing exchange (Pet. 16 n.6). As the court below observed in rejecting this claim, " '[w]ords that are clear on their face are to be understood in their common sense and usage' " and, therefore, do not require further definition. Pet. App. 25a

It is also readily apparent that petitioner construed the question to refer to the state prosecution. Immediately after responding to the question in the negative, petitioner explained that "the federal government has nothing to do with a state court prosecution * * * [and federal courts] are prohibited * * * from interfering in any way or having any input or say so with reference to any state court—ongoing state court criminal action" (Pet. App. 57a). Petitioner thus made it quite clear that he understood that the "Drew Fairchild case" being discussed in his grand jury testimony was the state-court prosecution.

2. Petitioner also contends (Pet. 18-21) that the evidence relating to Count IV failed to establish the assertion in the indictment that he "sought to influence the [Drew Fairchild] case by asking * * * Holmes to do what he could for Drew Fairchild" (Pet. App. 71a). Concomitantly, petitioner contends that the evidence failed to establish the falsity of his statements that "I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court" and that "I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way influence [*sic*] anybody with respect to this case" (*id.* at 60a, 61a). This challenge to the sufficiency of the evidence was explicitly resolved against petitioner by both courts below (see *id.* at 23a-25a, 30a-31a) and warrants no further review by this Court. In any event, it is without merit.

(quoting *United States* v. *Fulbright*, 804 F.2d 847, 851 (5th Cir. 1986)). In any event, it is clear from the record that petitioner's discussion of the Drew Fairchild case with Holmes was not merely a passing exchange. It began in Holmes's office, continued during a drive to Holmes's farm, and culminated in the telephone call made to Wiley Fairchild from Holmes's farm (see Pet. App. 15a-18a).

In the context of a perjury prosecution, the indictment must set out the alleged perjurious statement and the objective truth in stark contrast, so that the claim of falsity is clear. See, *e.g., United States* v. *Cowley,* 720 F.2d 1037, 1042 (9th Cir. 1983), cert. denied, 465 U.S. 1029 (1984); *United States* v. *Tonelli,* 577 F.2d 194, 195 (3d Cir. 1978). But "it is not necessary to prove the *exact* words of the accused in giving the false testimony, it being sufficient to prove substantially what he said." *United States* v. *Laite,* 418 F.2d 576, 580 (5th Cir. 1969). Thus, "[t]he exact words charged in the indictment need not be proved; if the charge is substantially proved, any variance is immaterial"(*ibid.*).

In this case, petitioner's testimony before the grand jury that he did not attempt to influence anyone with respect to the case does, in fact, stand in stark contrast with the allegation that he sought to influence the case by asking Holmes to do what he could for Drew Fairchild. And the proof of that allegation at trial was sufficient to allow the jury to find that it was true. Holmes testified that, during his meeting with petitioner, petitioner stated that, although he did not wish Holmes to do anything wrong, he was " 'just saying that Mr. Fairchild asked [him] to put in a good word' " for his son, Drew (Pet. App. 16a). That petitioner intended his "good word" on Drew Fairchild's behalf to influence Holmes's disposition of the case, despite his assertion to the contrary, is demonstrated by his ensuing call to Wiley Fairchild informing him that " 'everything [is] going to be taken care of to your satisfaction' " (*id.*. at 21a) and Holmes's statement to Wiley Fairchild in petitioner's presence that " 'when [petitioner] asks me to do something, I don't ask no questions, I just go ahead and do it' " (*id.* at 22a). Finally, the purpose of petitioner's request to Holmes is evidenced by a subsequent statement to Carroll Ingram, Wiley Fairchild's attorney, in which petitioner said that he had spoken to Holmes about Drew Fairchild's case and Wiley Fairchild's request, and

that Holmes had said that he would consider the request (Tr. 1070).[9]

3. Finally, petitioner claims (Pet. 21-25) that the operation of Fifth Circuit Rule 35.6 denied him a fair opportunity to have his suggestion for rehearing en banc considered by the court because it was impossible, unless recusals were withdrawn or additional judges were designated to vote on the suggestion, to secure the necessary majority vote of all judges in regular active service. Petitioner correctly notes (Pet. 22) that some courts of appeals permit rehearing en banc on the favorable vote of a majority of the nonrecused judges, although most courts of appeals do not. Petitioner does not claim that any court of appeals has ever allowed senior judges who were not members of the panel or judges from other circuits to vote on suggestions of rehearing en banc, or that there is statutory authority for such a procedure, although he contends that the Constitution requires such a procedure in the circumstances of this case.

Petitioner's contention that this Court should require a court of appeals to convene en banc when a majority of nonrecused judges vote in favor of rehearing en banc is purely academic. All three nonrecused judges of the court

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[9] Petitioner also claims that his statement that "I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court" (Pet. App. 60a) was literally true because "[t]he last phrase * * * *must* be read to modify the entire statement, and it is indisputable that [petitioner] played no role in Drew's case 'in' any court" (Pet. 20 (emphasis added)). There is no reason, however, why the sentence must be read in the unnatural way suggested. It was well within the province of the jury to interpret petitioner's words to mean what they seem to say, *i.e.*, that petitioner had nothing whatsoever, officially or unofficially, to do with any criminal case brought in federal court or in state court against Drew Fairchild. Because petitioner did have something "to do" with the state criminal case "unofficially," *i.e.*, he discussed the matter with Holmes, the jury had an ample basis to conclude that petitioner's statement was false.

of appeals opposed rehearing en banc in this case. Thus, even if this contention had merit, it would not help petitioner. In any event, the contention lacks merit.[10]

Petitioner's contention that the Constitution required the court of appeals to go even further and find additional judges to vote on the suggestion of rehearing en banc is supported by no authority and is without merit. As the Court explained in *Western Pac. R.R. Corp.* v. *Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953):

> In our view, [the en banc statute] is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its

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[10] In this Term alone there have been before this Court two cases in which the requirement of the vote of a majority of judges in regular active service, rather than just a majority of the voting judges, has worked to the detriment of the government. Because the teachings of this Court are clear—it is for the courts of appeals, not this Court, to fashion en banc procedures—we have refrained from petitioning on that issue in one case and have affirmatively urged the Court not to review the issue in the other case. See *Abourezk* v. *Reagan*, No. 84-5673 (D.C. Cir. May 23, 1986) (order denying government's suggestion for rehearing en banc despite favorable vote of five out of nine voting judges), aff'd by an equally divided Court, No. 86-656 (Oct. 19, 1987); *In re Ahlers*, 794 F.2d 388, 415 (8th Cir. 1986) (suggestion for rehearing en banc, supported by United States as amicus curiae, denied despite favorable vote of five out of nine voting judges), cert. granted *sub nom. Norwest Bank Worthington* v. *Ahlers*, No. 86-958 (June 22, 1987). We are serving on petitioner's counsel a copy of our amicus curiae brief at the petition stage in *Ahlers*, in which, although we expressed strong disagreement with the court of appeals on the merits, we also noted (at 9 & n.3) that the issue concerning en banc procedures was insubstantial. This Court's grant of certiorari in *Ahlers* was limited to one issue on the merits.

own administrative machinery to provide the means whereby a majority may order such a hearing.

Accord *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 624-625 (1974); *Shenker* v. *Baltimore & O.R.R.*, 374 U.S. 1, 4-5 (1963).[11] The en banc procedure that Congress has authorized, therefore, is fundamentally different from the right to appeal, which—although not constitutionally required—must meet constitutional demands if the legislature does provide it. No litigant has a constitutional right to any particular procedures in the consideration of a suggestion for rehearing en banc.

Petitioner's suggestion of rehearing en banc was reviewed by three circuit judges, all of whom concluded that it was without merit. He was not entitled to anything more.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1987

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[11] This Court also explained in *Moody*, 417 U.S. at 626, that the express language of 28 U.S.C. 46(c) "confines the power to order a rehearing in banc to those circuit judges who are in 'regular active service.' * * * [N]either the Court nor Congress has suggested that any other than a regular active service judge is eligible to participate in the making of the decision whether to hear or rehear a case in banc."

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